RECENT AMERICAN DECISIONS.

Supreme Court of Tennessee.

BATES v. TAYLOR, GOVERNOR.

The Courts have no jurisdiction over the Chief Executive of a State, to compel or restrain the performance of any official duty, whether executive or ministerial.

B filed a bill in equity, to compel A, the Governor of the State, to deliver to complainant a certificate of election to membership in Congress, and to enjoin the issuance of one to another applicant. The Constitution of Tennessee required the Governor to perform certain duties, and such others as might be devolved upon him by statute. Among the latter provided by the Code, was that of issuing a commission to each person elected to Congress. Facts were alleged tending to show that B had been duly declared elected, and that A had signed and sealed a commission to B, but pending its delivery, had changed his mind, and was about to issue a commission to C, a contestant. On motion to dismiss, *held*, that the Court had no jurisdiction over the Governor to grant the relief prayed for.

APPEAL from Chancery Court of Davidson County.

A bill was filed in the Chancery Court at Nashville, Tennessee, by Creed F. Bates, complainant, against Robert L. Taylor, Governor of the State, to compel the latter to deliver a certificate of election to the complainant and to prevent the issuance of a certificate to H. Clay Evans, another applicant.

Complainant alleged in substance, that he was elected to membership in the Fifty-first Congress of the United States, in the Third Congressional District of Tennessee, on the sixth day of November, 1888; that the fact of his election was duly ascertained by the Governor and Secretary of State, who by law constituted a board to canvass the returns; that, thereupon, in further compliance with the law, a certificate, showing the fact of his election, was made out, signed by the Governor, attested by the Secretary of State, and sealed with the great seal of the State; that, after all this, the Governor refused to deliver said certificate to the complainant, and claimed that one H. Clay Evans was elected to said office and entitled to receive a certificate of election instead of complainant; and that the Governor was about to issue a certificate to said Evans, though the latter was not elected and the Secretary of State would not join the Governor in such certificate.

Complainant further alleged that when the said board acted, and the certificate reciting his election was signed, attested and sealed, the board's power was exhausted and complainant's rights became fixed and his title to the office complete; that the board could not subsequently reconsider its action and declare another person elected; that in no event had the Governor a right to reconsider the matter himself, and issue a certificate to Evans, without the concurrence of the Secretary of State; that the issuance of a certificate to Evans would, in view of foregoing facts, be a usurpation of authority on the part of the Governor to the great and irreparable injury of complainant.

The prayer of the bill was that the Governor be enjoined from issuing a certificate to Evans, and that he be compelled to deliver the one already signed, attested and sealed to complainant.

The Governor appeared by counsel and moved the Court to dismiss the bill—

1. For want of equity on the face of the bill.
2. For want of jurisdiction in the Court.
3. Because it is unfit for a court of equity.

The Chancellor sustained the motion and dismissed the bill. Complainant appealed.

Vertrees & Vertrees, Hill & Grassbery and *Marks & Marks*, for complainant.

A. S. Colyar, Demoss & Moline and *S. Watson*, for respondent.

CALDWELL, J., Feb. 16, 1889, (after stating the foregoing facts): The main question debated at the bar, and that which is conclusive of the case, is one of jurisdiction.

The Constitution ordains that the Governor of the State shall perform certain duties therein prescribed, and such others as may from time to time be devolved upon him by act of the Legislature—Art. III. Among the duties so devolved upon him by statute is that of issuing a commission or certificate of election to each person elected representative to Congress. Code (M. and V.) sections 1094 and 1146. The issuance of

such commission or certificate, whether called a ministerial or an executive duty, is an official action, whose performance can be neither coerced nor restrained by the courts.

An attempt on the part of the courts to control his action under the statute would be an invasion by one department of the Government of the rights of another department, and, for that reason, a violation of sections 1 and 2 of Article II of the Constitution, which are in the following language:

"Sec. 1. The powers of the Government shall be divided into three distinct departments—the legislative, executive and judicial.

Sec. 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein directed or permitted."

It is well settled by all the authorities that mandamus will not lie to compel the Governor of a State to perform duties of a purely executive or political nature, involving the exercise of official judgment and discretion, but the decisions are wide apart as to the power of the courts to compel him to discharge those duties, which as other official duties are called ministerial.

The courts of Ohio, Alabama, California, Maryland and North Carolina, are together in holding that the Governor may be required by mandamus to perform duties of the latter class; while the courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota, New Jersey and Rhode Island, have uniformly held the contrary, upon the grounds that the powers of Government in the States are distributed among three departments, which under the organic law are to be and remain independent of each other: High on Extraordinary Legal Remedies, sections 118, 119, 120 and 121. This author cites the cases from the different States mentioned. We have examined them, and also a very instructive case from Michigan: *Sutherland* v. *The Governor* (1874), 29 Mich. 321, which is in accord with those from the States last mentioned, and we are fully persuaded not only that the weight of authority, but also the weight of reason, is against the power of the courts to coerce the Chief Executive of a State into the performance of any official duty.

This Court has heretofore put itself in line with those courts

denying the existence of such power: *Turnpike Company* v. *Brown* (1875), 8 Baxt. (Tenn.), 490. In that case, the Turnpike Company sought, by mandamus, to compel Governor Brown to issue certain bonds of the State which, it claimed, the Legislature had directed to be issued by the Governor. The relief was refused upon two grounds: first, because the company had not shown itself entitled to the bonds; and, secondly, because the Court had no jurisdiction to control the action of the Governor with respect thereto.

In combatting the idea that the Governor might be compelled to perform a ministerial duty, the Court, speaking through Judge McFARLAND, said: * * * "The Governor holds but one office, that is the office of Chief Executive. Any duty which he performs under authority of law is an executive duty, otherwise we would have him acting in separate and distinct capacities. In some respects he would be the Chief Executive, an independent department of the Government; as to others he would be a mere ministerial officer, subject to the mandate of any Judge of the State; and we must assume also that the Judge would have the power to imprison the Governor if he refused to obey his order, for if the Court has this jurisdiction, the power to enforce the judgment must follow." See 8 Baxt., 493. The jurisdiction was denied, upon the ground that the courts had no right to interfere with the head of another department of the Government in the discharge of a duty by law devolved upon him.

But it is now argued that so much of the opinion in that case as relates to the question of jurisdiction was *obiter dictum*, because the question decided in an earlier part of the opinion was conclusive of the case. This cannot be so. Both questions were fairly raised by the record, and the fact that the question of jurisdiction was discussed last, does not make it any the less entitled to the force of an adjudication.

It is further contended that this Court disregarded and overruled that part of that decision by taking jurisdiction of a mandamus proceeding against Governor Marks, in the late case of the *State ex rel.* v. *Board of Inspectors* (1880), 6 Lea (Tenn.), 12. The question of jurisdiction was expressly reserved in that case, for the reason, as stated in the opinion, that the Governor

had in his answer declared his willingness to submit to the direction of the Court.

Whether jurisdiction of the person in such a case can properly be confirmed in that way, is not material in this case. It does not arise here. It did arise there, and the Court exercised all the power of jurisdiction—whether rightfully or wrongfully, can neither affect the present case nor impair in any degree the authority of the Brown case. Jurisdiction was taken in Missouri: *R. R.* v. *The Governor* (1856), 23 Mo. 353, upon a similar expression from the Governor, while in Michigan it was refused: *Sutherland* v. *The Governor*, 29 Mich. 321.

We have no hesitation in holding that the courts have no jurisdiction to compel the Governor to deliver to complainant the certificate claimed by him, no more than have they the power to restrain him from issuing a certificate to the other applicant. If the Governor cannot be compelled by mandamus to deliver a certificate of election to one person, it follows that he cannot be restrained by injunction from delivering it to another person; for the nature of the act to be performed by him is precisely the same in one case as in the other, and the same considerations operate to defeat the jurisdiction of the courts in both instances.

But, conceding for the sake of the argument that the Governor could not, in the first instance, have been compelled to give the certificate to complainant or prevented from giving it to Evans, the very able and learned counsel of complainant go further and insist, with great force and plausibility, that the Chief Executive of a State may be enjoined from doing an unlawful thing; that, under the facts disclosed in the bill, the act sought to be restrained is unlawful, and that, being unlawful, its performance may be prevented by injunction.

The essence of these facts is that the Governor and Secretary of State together reached the conclusion from the returns that complainant had been elected, and, thereupon, prepared, signed, attested and sealed a certificate showing that fact, and that before the delivery of that certificate the Governor changed his mind, decided that Evans was elected, and without the concurrence of the Secretary of State, was about to issue a certificate to Evans, when this bill was filed.

The statute devolving upon the Governor the duty of issuing a commission or certificate of election necessarily confers upon him the right of determining when and how that duty, within the law, must be performed; and when he comes to do the thing required, he must be allowed to do it according to his own judgment as to the meaning of the law and on his own sense of official responsibility under his oath. In other words, it is his province to construe the statute for himself, and to determine for himself when he has complied with all its requirements, and when there yet remains something for him to do—whether he may act alone under a given state of facts, or must act in conjunction with another; and so long as he acts in good faith and with an honest purpose, discharging his duty under the law, his action cannot appropriately be characterized as unlawful. In such case the courts have no power to substitute their construction or judgment for his, and tell him when to stop or when to go on.

If they have such authority as to one statute imposing an obligation upon him, they have it as to all such statutes, and with respect to all requirements made of him by the Constitution as well.

Such a view would put the responsibility of the Governor's office upon the judiciary, and virtually make him subject to the direction of the courts in every action he might take—thereby working a substantial destruction of one department of the State Government, and a usurpation of its functions by another, contrary to the genius, spirit and letter of the Constitution.

If the Governor act corruptly he is amenable to the Legislature; and if, in an honest endeavor to discharge his duty, he mistake the law and prejudice individual rights, the injured person may in proper cases restrain the one benefited from using his advantage.

Let us illustrate the connection and at the same time the independence, the checks and balances, of the three departments of government: The Legislature should never pass nor the Governor approve an unconstitutional law; yet, because the duty of enacting laws rests upon the one, and that of approving or disapproving them upon the other, the courts cannot

restrain the former from passing nor the latter from approving a statute obviously unconstitutional. While acting in their own appropriate spheres the Legislature and the Governor must be allowed to judge of the constitutionality of the law for themselves. After that the judiciary acts, and, at the suit of some interested party, annuls the law because violative of the Constitution. Thus the integrity and independence of each department are preserved, conflict between them is prevented, and the injurious application of an unconstitutional law is averted.

We do not think the decisions of the Supreme Court of the United States stand in the way of the conclusion we have reached, though the Federal courts have, in several instances, taken jurisdiction of proceedings against the Governors of certain States and put them under restraint by injunction.

In *Davis* v. *Gray* (1872), 16 Wall. (83 U. S.) 203, Gov. Davis, of Texas, was enjoined from wrongfully issuing patents to land, which had previously been granted to other persons. The Governor of Louisiana was restrained from issuing bonds under an unconstitutional act, in the case of *Board of Liquidation* v. *McComb* (1875), 92 U. S. 531. In another case, the Governor of Missouri and others acting with him were by injunction prevented, or restrained for a time, from selling certain property to enforce statutory mortgage liens claimed by the State, the claim by the adverse party being that the liens had been satisfied: *Ralston* v. *Missouri Fund Commissioners* (1886), 120 U. S. 391.

The Davis case was cited approvingly in *Allen* v. *Railroad* (1884), 114 U. S. 311, and *In Re Ayers* (1887), 123 Id. 506; while it was questioned and limited in *Cunningham* v. *Macon & Brunswick Railroad* (1883), 109 Id. 453.

Now, the most that can be said of these cases is, that they show the jurisdiction of the Federal courts to restrain the Governor of a State from doing a wrongful act to the injury of individual rights. It is not even intimated in any one of them that the State courts have any such jurisdiction. There is a wide difference between the relation of the Federal judiciary and the State judiciary to the Governor of the State, and because of that difference, the Federal decisions referred to are

not at all in point in this case. A State's judiciary sustains the same relation to its Governor that the Federal judiciary does to the President of the United States; and as a State court, by reason of that relation, has no jurisdiction to coerce or restrain the Governor with respect to his official duties, so the Federal courts, for the same reason, have no power to interfere with the official acts of the President. It was so held in the case of the *State of Mississippi* v. *Johnson* (1866), 4 Wall. (71 U. S.) 499. In that case, the State of Mississippi, as party complainant, sought by injunction to restrain President Johnson from the execution of the reconstruction acts of Congress, upon the allegation that they were unconstitutional. The Court held that it had no jurisdiction either to compel the President to execute constitutional laws, or to restrain his action under unconstitutional legislation.

The reasoning of the Court is embraced in the following quotation from the opinion of Chief Justice CHASE, who spoke for the whole Court:

"It will hardly be contended that Congress (the courts?) can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet, how can the right of judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President? The Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such inference will be clearly seen upon consideration of its possible consequences.

"Suppose the bill filed and the injunction prayed for allowed. If the President refuses obedience it is needless to say the Court is without power to enforce the process. If, on the other hand, the President complies with the order of the Court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the Executive and Legislative Departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this Court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a Court of Impeachment? Would the strange spectacle be offered to the public world of an attempt by this Court to arrest proceedings in that Court?

"The questions answer themselves:" 4 Wall. 500 and 501.

The case of *Marbury* v. *Madison* (1803), 1 Cranch (5 U. S.)

137, is not in conflict, and could not be, for the President was not a party.

It may be of some interest, and not inappropriate at this point to note the fact that an unseemly conflict was narrowly escaped in that case, though the case was not against the President himself, but only against a member of his Cabinet.

Chief Justice GREEN, of New Jersey, says: "We have Mr. Jefferson's authority for saying that if the Supreme Court had granted a mandamus in the case of *Marbury* v. *Madison*, he should have regarded it as trenching on his appropriate sphere of duty; that he had instructed Mr. Madison not to deliver the commission, and that he was prepared, as President of the United States, to maintain his own construction of the Constitution with all the powers of the Government, against any control that might be attempted by the judiciary, in effecting what he regarded as the rightful powers of the Executive and Senate within their peculiar departments:" *The State* v. *The Governor* (1856), 25 N. J. L. 351.

The question of jurisdiction being conclusive, it has not been deemed important to decide whether, under the peculiar language of the statute, the delivering of the certificate made out for the complainant was necessary to invest him with a title to the office; nor whether, after the signing, attesting and sealing of that certificate, the Governor could rightfully reconsider his action and, without concurrence of the Secretary of State, issue to Evans a certificate.

But if the law be, as claimed in the bill and in the argument, that what was done with respect to the first certificate gave complainant a complete title and exhausted the power of the Governor, and that he could properly act only in conjunction with the Secretary of State, then, of course, a subsequent certificate by the Governor to Evans would neither confer title upon him nor impair the title of complainant; and there would be no sufficient reason for seeking the aid of a court of equity.

Let the decree be affirmed, and the bill dismissed at the cost of complainant.

This case is of interest as furnishing one more authority on the much mooted question of the jurisdiction of the State courts over the Governor, to compel by mandamus the performance of a ministerial act.

The general principle is of course well settled, that no public functionary of whatever grade can be compelled by the courts to perform his executive or political duties. It is quite equally well settled that, generally speaking, public officers can be required, through judicial process, to perform duties purely ministerial. A ministerial duty, as contra-distinguished from those of the executive or political class, is understood to be one in which nothing is left to discretion, but which the person upon a given state of facts performs in a prescribed manner in obedience to law: *State of Mississippi* v. *Johnson* (1867), 4 Wall. (71 U. S.) 498; *Flournoy* v. *City of Jeffersonville* (1861), 17 Ind. 169, 174.

In 1839, a case came before the Supreme Court of Arkansas on petition for mandamus, commanding the Governor to issue a commission to the petitioner as a commissioner of public buildings duly elected. The Governor declined to issue the commission, alleging as a ground for refusal that, when the election was held, there was no law in force authorizing the Legislature to hold an election for the office. The Court, without considering the merits of the case, refused the mandamus on the ground that under our system of government, the legislative, executive and judicial departments are independent of one another, and that no control, direction or review of the exercise of the functions of one department was contemplated as existing in another. The issuing of commissions was required of the Governor by a constitutional provision. It was a political duty which was not enforceable by judicial mandate. Nor could the fact that the act to be performed was merely of a ministerial or perfunctory nature, break down the barrier of separation between the departments which had been established. Said the Court in concluding its opinion, speaking by LACY, J.: "The analysis of his duties, then, clearly proves that he is in no way amenable to the judiciary for the manner in which he shall exercise or discharge these duties. His responsibility rests with the people and with the Legislature. If he does an unconstitutional act, the judiciary can annul it, and thereby assert and maintain the vested rights of the citizen. The writ asked for, however, does not proceed upon the ground that the Governor has done any illegal or unconstitutional act, but that he has refused to perform a legal or constitutional duty. In the first case, the Court certainly has jurisdiction; and in the last, they certainly have not. The Court can no more interfere with executive discretion, than the Legislature or Executive can with judicial discretion. The Constitution marks the boundaries between the respective powers of the several departments, and to obliterate its limits would produce such a conflict of jurisdiction as would inevitably destroy our whole political fabric; and with it, the principles of civil liberty itself. It would be an express violation of the Constitution, which declares upon its face, that there shall be three separate and independent departments of government, and that no person or persons, being of one of these departments, shall exercise any power belonging to either of the others:" *Hawkins* v. *Governor* (1839), 1 Ark. 570.

In 1856, an application for mandamus was made in Ohio, upon the relation of a banking association, to compel the Governor of the State to issue his proclamation, as required by statute, announcing that the relator was

entitled to commence and conduct the business of banking. The Court refused the mandamus on other grounds, but declared that ordinarily mandamus would lie against the Governor to compel the performance of his ministerial acts, such as the one before the Court. The grounds of the decision were, that, although by the Constitution the Governor was invested with important political powers, in the exercise of which his determinations were conclusive, yet that there was nothing in the nature of the chief executive office of the State which prevented the performance of duties merely ministerial being required of the Governor. The duty in question was merely ministerial, was required by statute, and might have been devolved upon any other officer of the State. It was not necessarily connected with the supreme executive power of the State. Such being the case, the Governor was amenable to law and could be required to do the specific act the same as any other public officer: *State* v. *Chase* (1856), 5 Ohio St. 528. This ruling was in the line of an utterance of the same Court as early as 1832, in *State ex rel. Loomis* v. *Moffitt*, 5 Ohio 358 (which was a *quo warranto* proceeding to try the title to a judgeship), to the effect that mandamus will lie against the Governor to compel him to issue a commission to a properly certified party, since "the Governor is no less amenable to law than the most humble citizen."

The principle enunciated in the Ohio case in 1856, would of itself be quite reconcilable with that of the earlier case in Arkansas, if there were nothing to follow by way of development of the principles of those cases. The two cases taken together, might be understood as establishing that the performance of an act required of the Governor by constitutional provision could not be compelled by mandamus, while the duty of performance of an act purely ministerial in its nature, if placed upon the Governor by the Legislature, might be enforced by such a proceeding. As matter of fact, however, later cases go much further on each side of the question, so that a harmony of decisions upon the above ground or upon any other is quite impossible.

The following are the decisions affirming the power in the courts to mandamus the Governor:

State v. *Chase*, *supra*.

Tennessee & Coosa R. R. Co. v. *Moore* (1860), 36 Ala. 371.

A sum of money had been loaned to a railroad company by act of the Legislature which required the Governor to draw his warrant in favor of the company upon certain terms being complied with, which it was shown had been done. The Court directed the issue of the writ.

Cotten v. *Ellis* (1860), 7 Jones (N. C.) 545.

Upon the relation of the Adjutant-General of North Carolina, the Court directed the writ to issue to compel the Governor to draw his warrant on the State Treasurer for salary earned.

State v. *Kirkwood* (1862), 14 Iowa 162.

The application was for a mandamus to compel the Governor to issue a certificate for certain lands. The petitioner had not complied with the conditions of the law and it was refused. The jurisdiction was, however, assumed to exist, to compel the Governor to perform ministerial duties.

Middleton v. *Low* (1866), 30 Cal. 596.

The Court declined to issue a mandamus upon the facts, but conceded that it would issue to compel the Governor to sign a patent for lands, upon the relator complying with the necessary provisions of the law.

Magruder v. *Swann* (1866), 25 Md. 173.

The application here was for a mandamus, to compel the Governor to issue a commission to the petitioner, who was elected judge, as appeared by the certificate of the clerk of the county. The duty of issuing commissions was imposed upon the Governor by Article IV, section 149, of the State Constitution of 1864, which provided that "all elections of judges and other officers provided for by this Constitution, State's attorneys excepted, shall be certified, and the returns made by the clerks of the respective counties to the Governor, who shall issue commissions to the different persons for the offices to which they shall have been respectively elected." The mandamus was allowed on the ground that, although the duty enjoined on the Governor was contained in the Constitution, it was not in that portion of the instrument relating to executive duties. Being purely a ministerial duty, it could therefore be required of the Governor or of any lower officer.

Harpending v. *Haight* (1870), 39 Cal. 189.

The Court directed the writ to issue, requiring the Governor to cause to be authenticated as a statute, a certain bill which had passed both houses of the Legislature and had not been returned with his veto. Mr. Justice TEMPLE dissented, on the ground that the duty to be performed was devolved upon the Governor by the Constitution, and that as to such duties, he was absolutely independent of control by the judiciary. [*Contra*, in Illinois: *People* v. *Yates*, *infra*].

Groome v. *Gwinn* (1875), 43 Md. 573.

The Court, by mandamus, directed the Governor to issue a commission and administer the oath of office to the Attorney-General, who had been duly returned elected.

Chumasero v. *Potts* (1875), 2 Mont. 242.

Mandamus was issued against a canvassing board, consisting of the Secretary, Marshal and Governor of the State, to compel a canvass of all the votes of the territory after a certain election, to determine the question of the removal of the seat of territorial government.

In re Cunningham (1875), 14 Kan. 416.

The Supreme Court of Kansas raised no objection to the issuing of the writ on jurisdictional grounds, but refused to compel the Governor to issue a patent for lands, because certain conditions had not been complied with by the petitioner.

Gray v. *State* (1880), 72 Ind. 567.

Mandamus was allowed against the Governor, Attorney-General, Treasurer, and Secretary of State, directing them to redeem certain bonds of the State, for whose redemption a specific fund had been provided. It was held, that other persons being joined with the Governor, upon whom, with him, was laid the duty to perform the act, it was not in any sense executive, but in the purest sense ministerial. There had been at least two previous decisions in Indiana, in which the courts issued the writ against the Governor. These were: *Governor* v. *Nelson* (1855), 6 Ind. 496, where the Governor was compelled to issue a commission to the clerk of a circuit court; and *Baker* v. *Kirk* (1870), 33 Ind. 517, where the issuing of a commission to a plaintiff as the director of a State prison, was directed. In neither of these cases, however, was the right of the Court to issue the mandamus against the Governor disputed.

The following are the decisions denying the power in the courts to issue the writ:

Hawkins v. *Governor*, *supra*; *Low* v. *Towns* (1850), 8 Ga. 360.

The Court declined to compel the Governor to issue a commission to Low as clerk of court, a statute providing that such officers should be commissioned by the Governor. The justices saw no reason why the chief executive should not be compelled by mandamus to perform a ministerial act, but refused the writ for political reasons. The Governor, it was said, has certain other duties to perform, which the needs of the people require to be done. A refusal on the part of the Governor to comply with the order of court, would subject him to imprisonment, in the event of which the person chosen by the people to act as Governor could not exercise his necessary functions.

In re Dennett (1851), 32 Me. 508. The Court declined to issue a mandamus against the Governor and council to compel them to declare the election of the petitioner to the office of county commissioner. The duty required of them was statutory.

State v. *Governor* (1856), 25 N. J. L. 331.

Mandamus was refused to compel the Governor to issue a commission to the applicant as surrogate of the county of Passaic. A constitutional provision required the Governor to issue commissions to officers of the State requiring to be commissioned. The refusal of the writ was put on the ground, *inter alia*, that the Court had no power to award a mandamus, either to compel the execution of any duty enjoined on the Executive by the Constitution, or to direct the manner of its performance.

People v. *Bissell* (1857), 19 Ill. 229.

The Court declined to compel the Governor to issue to the petitioner certain new bonds of the State, which a statute required should be issued in payment of arrears of interest on old bonds.

People v. *Yates* (1863), 40 Ill. 126.

The Court, upon facts quite identical with those in *Harpending* v. *Haight*, *supra*, decided directly contrary to the California court.

Mauran v. *Smith* (1865), 8 R. I. 192.

The Court refused to issue the writ against the Governor to compel him to convene a court martial for the trial of charges preferred against the petitioner.

State v. *Governor* (1867), 39 Mo. 388.

The Supreme Court of Missouri decided that it had no jurisdiction over the Governor to compel him to issue to relator a commission as a county justice. The duty of issuing such commissions was placed upon the Governor by constitutional provision, and, as a political duty, was not under the control of the courts. The same Court at an earlier period (1856), had issued a writ of mandamus against the Governor, but the latter had admitted the jurisdiction by expressing his willingness to perform the duties devolved upon him, if the Court should so direct.

Pacific Railroad v. *Governor* 23 Mo. 353; *State* v. *Warmouth* (1870), 22 La. An. 1.

A statute required the Governor to sign and deliver to the State Auditor, for issuing to parties entitled, bonds due contractors for public works. The Court declined to compel the Governor to sign and deliver certain bonds claimed by the petitioner.

Rice v. *Austin* (1872), 19 Minn. 103.

The Court refused the writ asked for to compel the Governor to execute and deliver to petitioner a deed of certain lands claimed under the provisions of a statute. The act was conceded to be a ministerial act. In an earlier case in the State, *Chamberlain* v. *Sibley* (1860), 4 Minn. 309, it was admitted *obiter*, that the Governor could be compelled to perform his ministerial duties. In *Rice* v. *Austin*, however, the dictum in *Chamberlain* v. *Sibley* was repudiated

(without reference to the case however), and the independence of the executive department declared to depend as much upon the non-interference of the judiciary in the ministerial functions of his office as in those strictly executive in their nature.

Sutherland v. *Governor* (1874), 29 Mich. 320.

The application to the Court was for an order requiring the Governor to show cause why he did not issue a certificate, showing that the Portage Lake and Lake Superior ship canal and harbor had been constructed in conformity to an act of Congress, which required the Governor to issue his certificate of the fact. Mr. Justice COOLEY for the Court, in refusing the writ, took very broad grounds against the jurisdiction, declaring that all duties imposed upon the Governor as such, whether by constitution or by statute, were official, and in the matter of their performance, he was not liable to mandamus.

Turnpike Company v. *Brown* (1875), 8 Baxt. (Tenn.) 490.

The facts of this case were as recited in the principal case, the Court refusing the mandamus.

In *Appeal of Hartranft et al.* (1877), 85 Pa. 433, it was held by the Supreme Court of Pennsylvania that the Governor and certain other State officers were not liable to attachment for disobeying a subpoena to testify before a grand jury as to matters of fact in connection with certain riots at Pittsburgh, with which facts they became conversant in performing the duties of their respective offices. In the course of the opinion, the Court, referring to *State* v. *Warmouth, supra*, approves of the doctrine that the Governor is not subject to mandamus, to compel the performance of a ministerial duty.

State v. *Drew* (1879), 17 Fla. 67.

The mandamus asked for was to have the Governor compelled to issue to the relator a commission as United States Representative, after the Board of Canvassers had declared him elected. The laws of Florida required the Governor to make out, sign, cause to be sealed and transmit a certificate of election. The writ was refused, Mr. Justice WESTCOTT dissenting.

People v. *Cullom* (1881), 100 Ill. 472.

The Court of last resort in Illinois declined to mandamus the Governor to call an election as required by law.

SUMMARY.

It will thus be seen that the courts of nine States and Territories (to wit, Alabama, California, Indiana, Iowa, Kansas, Maryland, Montana, North Carolina, and Ohio), affirm the jurisdiction; while the courts of eleven States (to wit, Arkansas, Florida, Georgia, Illinois, Louisiana, Maine, Michigan, Missouri, New Jersey, Rhode Island, and Pennsylvania), deny it.

In the difference of opinion that has existed among the State courts, resort has been had to the decisions of the Supreme Court of the United States, on the subject of mandamus to executive officers of the Federal Government. The Federal courts, as shown in the principal case, have several times enjoined State Governors. These decisions are, however, scarcely relevant to the question of the jurisdiction of the State courts over the executive department of the State. The Federal Government sprang not from the States, but from the people of the United States. If the Governor of a State refuses to perform a ministerial duty, lawfully required of him, and the Federal courts have jurisdiction on other grounds, there is perhaps no reason why they should decline jurisdiction by mandamus or injunction, merely because his status *qua* the State, happened to be that of chief executive officer. There is apparently nothing in

the relations of the Federal and State systems, requiring the Federal courts to regard as independent of their control, the executive officers of a State. The Federal courts are bound to respect the separation of functions of the legislative, executive and judicial departments established by the Constitution of the United States, and to recognize the independence of each, but this obligation does not require the same recognition of the similar departments established by the State. It was decided in *Kentucky* v. *Dennison* (1860), 24 How. (65 U. S.) 66, that Congress had no power to impose duties upon State officers, and that such duties attempted to be imposed the Federal court could not enforce. But as indicated above, a ministerial duty plainly and lawfully required of a State officer, is clearly within the cognizance of the Federal courts.

The only relevant analogy in the Federal legislation is the relation of the Federal courts to the President. It has never been decided that the President is or is not subject to mandamus to compel him to perform ministerial duties.

Marbury v. *Madison* (1803), 1 Cranch (5 U. S.) 137, is the leading case on mandamus in the United Courts. The action was brought to compel President Jefferson's Secretary of State, Mr. Madison, to deliver to the plaintiffs their commissions as justices of the peace in the District of Columbia. They had been appointed and confirmed during the administration of President Adams, and their commissions had been signed and sealed. The Court decided that the Supreme Court of the United States had no original jurisdiction to consider the case, and discharged the rule which had been granted. Chief Justice MARSHALL, however, in the course of his opinion, declared in favor of the granting of the writ in general against public officers, for the performance of such ministerial duties as were required of Mr. Madison. The principles there stated have been recognized and followed, as applied to similar cases. Some of the expressions used have furnished the basis for the doctrine of those courts that sustain the issuing of the writ against the Governor. For example, it was said, *inter alia*, by the Court: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined:" p. 170.

There are other expressions, indicating that there was no purpose to express an opinion that the President, equally with his cabinet officers, was amenable to the writ. And, indeed, it was conceded by counsel in the case, that the President was not personally subject to mandamus; Charles Lee, attorney for the plaintiffs, who had been Attorney-General, saying, p. 149: "I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode provided in the Constitution."

A number of other cases have confirmed the jurisdiction of the courts to compel the performance of the purely ministerial duties of cabinet and other similar officers. Among these are *Kendall* v. *United States* (1838), 12 Pet. (37 U. S.) 524; *United States* v. *Schurz* (1880), 102 U. S. 378; *Butterworth* v. *United States* (1884), 112 Id. 50; *United States ex rel. Miller* v. *Black* (1888), 128 Id. 40.

In the *State of Mississippi* v. *Johnson* (1867), 4 Wall. (71 U. S.) 475, it was sought to enjoin President Johnson from carrying out the Reconstruction Acts. The Court ruled, upon the only point

necessary to a decision, that the President cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional. It refused (p. 498), to express an opinion whether, in any case, the President might be required by the process of the Court to perform a purely ministerial act under a positive law. In the briefs of counsel in this case are presented very fully and forcibly the arguments that exist in favor of and against the jurisdiction of the courts over the chief executive officer of the United States.

In the course of the opinion of the Court in *Kendall* v. *The United States* (1838), 12 Pet. (37 U. S.) p. 610, it was said: "The executive power is vested in a President; and as far as his powers are derived from the Constitution he is beyond the reach of any other department, except in the mode prescribed by the Constitution, through the impeaching power."

In the judgment of the writer, the weight of the argument is with the view taken by the Supreme Court of Tennessee in the principal case, that mandamus will not lie against the Governor. The courts that take jurisdiction, do so on the general principle that when one man shows himself entitled to a specific thing in the form of property or office and he is deprived of it by another, the courts will provide the means for his obtaining it, following the maxim that there is no wrong without a remedy. If this were the only possible aspect of the question, there would be no reason for the court withholding its arm in any case where the failure to perform a ministerial duty were established to its satisfaction, whether the defendant happened to be the Governor of the State, or an officer of less dignity.

It is quite impossible, however, to ignore the fact that the courts exercise their functions as part of a governmental system embodied in a written constitution, which has as its fundamental principle of organization the complete independence of the executive and judicial as well as legislative departments. If the judicial department may, in any case, direct or control the performance of a duty by another department, the barrier of separation is at once broken down.

It is no answer to say that in matters purely ministerial, the Governor does not exercise executive functions, and therefore is subject to judicial control as to such acts. Said TALIAFERRO, J., in *State* v. *Warmouth*, *supra:* "We think this doctrine objectionable in this, that it accords to the judiciary the large discretion of determining the character of all the acts to be performed by the chief executive officer, as being merely ministerial or otherwise. This would infringe the right of the executive to use discretion in determining the same question. He must be presumed to have this discretion, and the right of deciding what acts his duties require him to perform, otherwise his functions would be trammeled, and the executive branch of the Government made subservient in an important feature to the judiciary."

If it be said that to give the governor the power of final determination, as to the performance of acts required of him, would be to acknowledge an authority higher than the law, the answer is at hand, that the law from which the judges derive their power to act is the constitution, and no supremacy or control can be asserted or maintained by them that is not recognized by that instrument.

The best answer to the position, that if the governor is free from control by the courts, parties having rights will in many cases be left without remedy, is given by COOLEY, J., in *Sutherland* v.

Governor (1874), 29 Mich., at page 330: "Practically, there are a great many such cases, but, theoretically, there are none at all. All wrongs, certainly, are not redressed by the judicial department. A party may be deprived of a right by a wrong verdict, or an erroneous ruling of a judge, and though the error may be manifest to all others than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the legislature may have his seat given by the house to another, and be thus wronged without remedy. A just claim against the State may be rejected by the board of auditors, and neither the governor nor the courts can give relief. A convicted person may conclusively demonstrate his innocence to the governor, and still be denied a pardon. In which one of these cases could the denial of redress by the proper tribunal, constitute any ground for interference by any other authority? The law must leave the final decision upon every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial. The party applying for action, which under the constitution and laws, depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision."

And it is not easy to see why the courts shall have any more power of control over the action of the governor in any given case, if the duty required of him happens to be statutory, than if imposed by the constitution. So long as it is required of him as governor, that is, as the functionary occupying the chief executive office, in performing it, it would seem, he may claim the officer's immunity from control.

Of course it is not contended that the governor, as a private citizen, is free from liability to judicial process. It is admitted by all the courts that for his private acts, or for any acts not properly within the scope of his office, he is, as any other citizen, amenable to process.

The logic of the argument relieving the governor from judicial process, requires that where, by the constitution of the State, the executive department is specifically vested in other officers with him, they, as well as he, are free from control or direction at the hands of the courts. Accordingly, in *Houston Tap & Brazonia R. R. Co.* v. *Randolph* (1859), 24 Tex. 317, the Court for this reason refused to compel the Treasurer of the State to pay certain bonds, the warrants for whose payment were duly presented, in strict compliance with law.

So, in *County* v. *Dike* (1874), 20 Minn. 363, the Constitution of Minnesota providing that the executive department should consist of a governor, lieutenant-governor, secretary of state, auditor, treasurer, and attorney-general, chosen by the electors of the State, it was held that a mandamus would not lie against the State Treasurer and Secretary of State.

It will be observed that the Constitution of the United States vests the executive power solely in the President. It is, therefore, quite in keeping with the above view, that mandamus proceedings should be entertained against Cabinet officers in certain cases, since they are not, by the organic law, vested with any executive power, and therefore made part of an independent branch of the Government.

The judgment in the principal case has been criticised as not being warranted by the facts. It has been urged that the case really presented the question of whether the Governor, after signing the commission, which entitled

the relator to it as a vested right, could lawfully withhold it from him or issue a commission to another. Counsel for the relator contended with much force that the Governor's power of acting being *functus officio*, he could not preserve an immunity from judicial cognizance of his subsequent acts in the matter, merely because he honestly believed that, as Governor, he still had the power to act by awarding the commission to another. If, as Governor, he had no further power to act, it was forcibly urged he could not obtain that power merely by supposing he had it. It was therefore deemed by the relator essential that the Court should pass upon the question of his title. This the Court declined to do, resting its decision solely upon the ground that no jurisdiction existed to control the Governor's acts in the premises. It seems to the annotator obvious that the Court upon its view of the constitutional question involved, was right in declining to enter into any other discussion. The Court either had or had not jurisdiction over the Governor by mandamus and injunction in his official capacity. The fact that the Governor assumed to act, when his power was exhausted, could not give jurisdiction to the courts, if the law of the land denied it. The fact that practically an irreparable wrong might be perpetrated by the Governor upon the relator by withholding his commission, could not vest authority in the courts to redress the wrong, if they had not that power given them under the system of government of which both the executive and the judiciary were parts.

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Philadelphia.

[In the case of *Riley* v. *Hovey*, decided by the Supreme Court of Indiana, May 18, 1889, the court ordered a mandate against the Governor, compelling him to issue a commission to Riley as a trustee, elected by the Legislature, for the Institution for the Blind. The question agitated, however, was merely whether the Legislature could elect to the office.] J. B. U.

Supreme Court of the United States.

WHITE, ET AL., v. COTZHAUSEN.

When an insolvent debtor transfers substantially all his property to a part of his creditors, the form of the transfer or transfers will be disregarded, and a statute forbidding preferences in assignments for the benefit of creditors will be held applicable in equity to authorize proceedings of an equal distribution of the assets among all the creditors.

The mere name of the particular instruments used will be disregarded in equity, and the court will consider whether the financially embarrassed debtor has, in good faith, and without a present purpose of discontinuing business, compromised his liabilities by sale or transfer of his property.

The attempt to obtain an illegal preference over other creditors, will not deprive the creditor making such an attempt, of his equal share in the estate of the insolvent debtor.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was an appeal from a decree declaring two conveyances of real property in Illinois, a bill of sale of numerous pictures, a judgment by confession in one of the courts of that State pursuant to a warrant of attorney given for that purpose, and certain transfers of property accompanying that warrant, to be void as against the appellee, Cotzhausen, a judgment creditor of Alexander White, Jr. It was assigned for error that the decree was not supported by the evidence. Besides controverting this position, the appellee contended that the conveyances, judgment by confession, and transfers, were illegal and void under the provisions of the Act of the General Assembly of Illinois, in force July 1, 1877, concerning voluntary assignments for the benefit of creditors. 1 Starr & C. St. 1303 (see the quotations in the opinion of the Court, *infra*).

The record contained a large amount of testimony, oral and written, but the principal facts were as follows: Alexander White, Sr., died intestate in the year 1872; his wife, Ann White, four daughters, Margaret, Elsie, Mary S., and Annie, and two sons, Alexander and James B., surviving him. Each of the children, except James, was of full age when the father died. At the request of the mother, and with the assent of his sisters,

Alexander White, Jr., qualified as administrator, and in that capacity received personal assets of considerable value. With their approval, if not by their express direction, he undertook the management of the real estate of which his father died possessed; making improvements, collecting rents, paying taxes and causing repairs to be made. He received realty in exchange for stock in a manufacturing company, and in part exchange for the homestead, taking the title in his own name. After the death of the father, the widow and children remained together as one household, the expenses of the family, and of each member of it, being met with money furnished by Alexander White, Jr., out of funds he received from time to time, and deposited in bank to his credit as administrator. But no regular account was kept, showing the amount paid to or for individual members of the family. In 1878, it was determined by the widow and children to have an assignment of dower and a partition of the real property, and proceedings to that end were instituted in the Circuit Court of Cook county, Illinois. Before the close of that year, or in the spring or summer of 1879, having failed to obtain from the administrator a satisfactory account of the condition of the estate, they consulted an attorney, who, upon investigation, ascertained (using here the words of appellants' counsel) that Alexander White, Jr., "had lost the entire personal estate, and had nothing, except his interest as an heir in certain of the real estate, with which to make good his losses." It appeared, as is further stated, that he had mortgaged some of the real property, the title to which had been taken in his name; had anticipated rents on other property; had exchanged lands for stock in a heating and ventilating company; had allowed taxes to accumulate; and had, besides, induced some members of the family to guaranty his notes to a large amount. Upon these disclosures being made, the property was put under the immediate charge of the younger son, and the attorney with whom the mother and sisters had advised, was directed to collect the amount due from Alexander White, Jr. Thereupon a friendly accounting was had, which resulted in a report by him to the Probate Court, on the 18th of July, 1879, of his acts and doings as administrator during the whole period from the date of his

appointment, April 9, 1872, to July 21, 1879. The report admits a balance due from him as administrator of $89,646.05, and charges him, "by virtue of the statute" (Rev. St. Ill. 1874, c. 3, § 113), with $40,123.80, being interest on that sum from January 21, 1875, to July 21, 1879, at the rate of 10 per cent. per annum; in all, the sum of $129,769.85. He does not seem to have asserted any claim whatever for his services as administrator, or for managing the real property. That report was approved by the Probate Court, which made an order, July 22, 1879, directing the said sum of $129,769.85 to be distributed and paid by the administrator as follows: To the widow, $43,256.61, and to each of the other children, $14,418.87. It should be stated in this connection, that on the 16th of July, 1879, two days before the report to the Probate Court, the proceedings in the partition suit were brought to a conclusion by a decree assigning dower to the widow, and setting off specific parcels of land to Margaret and Alexander, respectively, and other parcels to the remaining heirs jointly. On the same day, Alexander White, Jr., executed two conveyances—one to his sisters (except Margaret), and his brother James, jointly, for part of the lands assigned to him by the decree of partition, and the other to his sister Margaret, for the remaining part; the former deed reciting a consideration of $56,859.20, which is about the aggregate of the several amounts subsequently directed to be paid by the administrator to his brother and sisters (except Margaret), while the latter deed recited a consideration of $14,214.80, which is about the sum directed to be paid to his sister Margaret. Two days later, July 18, 1879, Alexander White, Jr., executed to his mother, brother, and sisters (except Margaret), a bill of sale of his interest in certain pictures which had come to his hands as administrator; and three days thereafter, July 21, 1879, he executed to his mother a note, accompanied by a warrant of attorney to confess judgment, and by a conveyance and transfer of certain real and personal property as collateral security for the note. Subsequently, September 4, 1879, pursuant to that warrant of attorney, judgment was entered against Alexander White, Jr., for $43,807.50, in the Circuit Court of Cook county. It is not claimed that any money was paid to him in

these transactions, and it is admitted that the sole consideration for his transfers of property to the members of his family was his alleged indebtedness to them, respectively.

By the final decree in these consolidated causes, it was adjudged that the two conveyances of July 16, 1879, the bill of sale of July 18, 1879, and the judgment by confession of September 4, 1879, and the transfers accompanying the warrant of attorney of July 21, 1879, were made without adequate consideration, and with intent to hinder, delay, and defraud the appellee, Cotzhausen, who was found by the decree to be a creditor of Alexander White, Jr., in the sum of $27,842.22, the aggregate principal and interest of four several judgments obtained by him against White, in 1881 and 1882. The debts for which these judgments were rendered, originated in the early part of 1878, in a purchase from Cotzhausen of nearly all the stock of the American Oleograph Company, whose principal place of business was Milwaukee, Wisconsin. In this purchase Alexander White, Jr., was interested. It is to be inferred from the evidence that the principal object he had in making it, was to transfer the office of the company to one of the buildings owned by the family in Chicago, and to start or establish his younger brother in business. His mother and sisters were evidently aware of his purchase, and approved the object for which it was made. It may be here stated that Margaret White died unmarried and intestate before the decree in this cause was entered, but the fact of her death was not previously entered of record. The parties to the present appeal, however, by written stipulation filed in this cause, waived all objections they might otherwise make by reason of that fact. It was further stipulated that the appellants were the only heirs at law of Margaret White. The appellee waived all objections to the present appeal on the ground that Alexander White, Jr., did not join in it.

Ira W. Buell and *C. M. Osborn*, for appellants.

Enoch Totten and *John C. Spooner*, for appellee.

Mr. Justice HARLAN, January 28, 1889. (*After stating the facts as above*):

Too much stress is laid by the appellee upon the fact that Alexander White, Jr., after qualifying as administrator, was authorized by his mother and sisters to control, in his discretion, both the real and personal estate, of which his father died possessed. The granting of such authority cannot be held to have created any lien in favor of his creditors upon their respective interests. Nor can it be said that they surrendered their right to demand from him an accounting, in respect to his management of the property. Upon such accounting, he might become indebted to them; and, to the extent that he was justly so indebted, they would be his creditors, with the same right that other unsecured creditors had to obtain satisfaction of their claims. The mode adopted by them to that end, with full knowledge as well, of his financial condition, as of the fact that he was being pressed by Cotzhausen, was, to take property on account of their respective claims. After he had executed the conveyances, bill of sale, warrant of attorney, and transfers, to which reference has been made, he was left without anything that could be reached by Cotzhausen. So completely was he stripped by these transactions of all property, that, subsequently, when his deposition was taken, he admitted that he owned nothing, except the clothing he wore. He recognized his hopelessly insolvent condition, and formed the purpose of yielding to creditors the dominion of his entire estate; and it is too plain to admit of dispute, that in executing to his mother, sisters, and brother, the conveyances, bill of sale, warrant of attorney, and transfers in question, his intention was to give them, and their intention was to obtain, a preference over all other creditors. What was done, was in execution of a scheme for the appropriation of his entire estate by his family, to the exclusion of other creditors, thereby avoiding the effect of a formal assignment.

The first question, therefore, to be considered is, whether the several writings executed by Alexander White, Jr., for the purpose of effecting that result, may be regarded as, in legal effect, one instrument, designed to evade or defeat the provisions of the statute of Illinois, known as the "Voluntary Assignment Act," in force July 1, 1877 [Laws of 1877, page 116; 1 Starr & C. St. 1303]. The first section of that statute provides—

§ 1. That, in all cases of voluntary assignments hereafter made for the benefit of creditor or creditors, the debtor or debtors shall annex to such assignment an inventory, under oath or affirmation, of his, her, or their estate, real and personal, according to the best of his, her, or their knowledge; and also a list of his, her, or their creditors, their residence and place of business, if known, and the amount of their respective demands; but such inventory shall not be conclusive as to the amount of the debtor's estate, but such assignment shall vest in the assignee or assignees, the title to any other property, not exempt by law, belonging to the debtor or debtors at the time of making the assignment, and comprehended within the general terms of the same. Every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside, or where the business in respect of which the same is made, has been carried on; and in case said assignment shall embrace lands, or any interest therein, then the same shall also be recorded in the county or counties in which said land may be situated.

Other sections provide for publication of notices or creditors; for the execution by the assignee of a bond and the filing of an inventory in the county court; for the report of a list of all creditors of the assignor; and for exception by any person interested to the claim or demand of any other creditor. The sixth section provides—

"That at the first term of the said county court, after the expiration of the three months, as aforesaid, should no exception be made to the claim of any creditor, or if exceptions have been made, and the same have been adjudicated and settled by the court, the said court shall order the assignee or assignees to make, from time to time, fair and equal dividends (among the creditors) of the assets in his or their hands, in proportion to their claims," etc.

The eighth section declares—

"That no assignment shall be declared fraudulent or void for want of any list or inventory as provided in the first section."

§ 13. Every provision in any assignment, hereafter made in this State, providing for the payment of one debt or liability in preference to another, shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof.

The main object of this legislation is manifest. It is to secure equality of right among the creditors of a debtor who makes a voluntary assignment of his property. It annuls every provision in any assignment, giving a preference of one creditor over another. No creditor is to be excluded from participation in the proceeds of the assigned property because of the failure of the debtor to make and file the required inventory of his estate and the list of his creditors; nor, if such a list is filed,

is any creditor to be denied his *pro rata* part of such proceeds, because his name is omitted, either by design or mistake upon the part of the debtor. The difficulty with the courts has not been in recognizing the beneficent objects of this legislation, but in determining whether, in view of the special circumstances attending their execution, particular instruments are to be treated as part of an assignment, within the meaning of the statute. The leading case upon this subject in the Supreme Court of Illinois is *Preston* v. *Spaulding* (1887), 120 Ill. 208. In that case, the members of an insolvent firm, in anticipation of bankruptcy, made, within a period of less than thirty days, four conveyances of their individual estate to near relatives, and various payments of money to other relatives, on alleged debts; after these conveyances and payments, and with full knowledge of impending failure, the members of the firm held a conference with their legal advisers, before the expiration of said thirty days, respecting the measures to be adopted by them, and the shape their failure was to assume. It was determined that they should make a voluntary assignment, but that preference be given to certain creditors by executing to them what are called "judgment notes." The assignment in form was made, but on the same day, and before it was executed, the creditors to whom the notes were given, caused judgment by confession to be entered thereon, and immediately, and before the deed of assignment was or could be filed, caused execution to be issued and levied, whereby they took to themselves the great bulk of the debtor's estate. The trustee named in the assignment having refused to attack the preferences thus secured, a creditor brought suit in equity, upon the theory that the giving of the judgment note and the making of the deed of assignment were parts of one transaction, and consequently the preferences attempted were illegal and void under the statute. The Supreme Court of Illinois, considering the question whether the preferential judgments obtained in that case were within the prohibitions of the Act of 1877, said—

"The statute is silent as to the form of the instrument or instruments by which an insolvent debtor may effect an assignment. * * * If then, these preferences are to be held to be within the 'provisions' of the assignment or 'comprehended within its general terms,' it must be because they fall within the intent

and spirit of the act. It will be observed this act does not assume to interfere, in the slightest degree, with the action of a debtor, while he retains the dominion of his property. Notwithstanding this act, he may now, as heretofore, in good faith, sell his property, mortgage or pledge it to secure a *bona fide* debt, or create a lien upon it by operation of law, as by confessing a judgment in favor of a *bona fide* creditor. But when he reaches the point where he is ready, and determines to yield the dominion of his property, and makes an assignment for the benefit of his creditors, under the statute, this act declares that the effect of such assignment shall be the surrender and conveyance of all his estate, not exempt by law, to his assignee, rendering void all preferences, and bringing about the distribution of his whole estate equally among his *bona fide* creditors; and we hold that it is within the spirit and intent of the statute that, when the debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken, the law will regard all his acts having for their object and effect the disposition of his estate, as parts of a single transaction, and, on the execution of the formal assignment, it will, under the statute, draw to it, and the law will regard as embraced within its provisions, all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors; and, if any preferences are shown to have been made or given by the debtor to one creditor over another in such disposition of his estate, full effect will be given the assignment, and such preferences will, in a court of equity, be declared void, and set aside as in fraud of the statute."

After setting out the details of the plan devised to secure certain creditors a preference in advance of the filing of the deed of assignment, the Court further said—

"It will be observed that all this was strictly in accordance with the forms of law; but will any one deny that a most palpable fraud was in fact perpetrated upon the appellee, Spaulding, by the debtors, or that the acts of the debtors were in fraud of the statute? * * * This voluntary assignment act is in its character remedial, and must therefore be liberally construed, and no insolvent debtor having in view the disposition of his estate, can be permitted to defeat its operation, by effecting unequal distribution of his estate by means of an assignment, and any other shift or artifice under the forms of law; and, whatever obstacles might be encountered in other courts of this State, a court of equity, when properly invoked, was bound to look through and beyond the form, and have regard to the substance, and, having done so, to find and declare these preferential judgments void under the statute, and to set them aside."

See, also, *Bank's Appeal* (1868), 57 Pa. 193, 199; *Winner* v. *Hoyt* (1886), 66 Wis. 227, 239; *Wilks* v. *Walker* (1884), 22 S. C. 108, 111.

We agree with the Supreme Court of Illinois that this statute, being remedial in its character, must be liberally construed; that is, construed "largely and beneficially, so as to

suppress the mischief and advance the remedy." That Court said in *Railroad Co.* v. *Dunn* (1869), 52 Ill. 260, 263: "The rule in construing remedial statutes, though it may be in derogation of the common law, is, that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it." See, also, *Johnes* v. *Johnes* (1814), 3 Dow 15. If, then, we avoid overstrict construction, and regard substance rather than form; if effect be given to this legislation, as against mere devices that will defeat the object of its enactment,—the several writings executed by Alexander White, Jr., all about the same time, to his mother, sisters, and brother, whereby, in contemplation of his bankruptcy, and according to a plan previously formed, he surrendered his entire estate for their benefit, to the exclusion of all other creditors, must be deemed a single instrument, expressing the purposes of the parties in consummating one transaction, and operating as an assignment or transfer under which the appellee, Cotzhausen, may claim equality of right with the creditors so preferred. It is true there was not here, as in *Preston* v. *Spaulding*, a formal deed of assignment by the debtor under the statute. But of what avail will the statute be in securing equality among the creditors of a debtor, who, being insolvent, has determined to yield the dominion of his entire estate, and surrender it for the benefit of creditors, if some of them can be preferred by the simple device of not making a formal assignment, and permitting them, under the cover or by means of conveyances, bills of sale, or written transfers, to take his whole estate on account of their respective debts, to the exclusion of other creditors? If Alexander White, Jr., intending to surrender all his property for the benefit of his creditors, and to stop business, had excepted from the conveyances, bill of sale, and transfers executed to his mother, sisters, and brother, a relatively small amount of property, and had shortly thereafter made a general assignment under the statute, it could not be doubted under the decision in *Preston* v. *Spaulding*, and in view of the facts here disclosed, that such conveyances, bill of sale, and transfers would have been held void as giving forbidden preferences to particular creditors; and his assignment would have been held, at the

suit of other creditors, to embrace, not simply the property owned by him when it was made, but all that he previously conveyed, sold, and transferred to his mother, sisters, and brother. But can he, having the intention to quit business and surrender his entire estate to creditors, be permitted to defeat any such result by simply omitting to make a formal assignment, and by including the whole of his property in conveyances, bills of sale, and transfers to the particular creditors whom he desires to prefer? Shall a failing debtor be allowed to employ indirect means to accomplish that which the law prohibits to be done directly? These questions must be answered in the negative. They could not be answered otherwise without suggesting an easy mode by which the entire object of this legislation may be defeated.

We would not be understood as contravening the general principle, so distinctly announced by the Supreme Court of Illinois, that a debtor, even when financially embarrassed, may in good faith compromise his liabilities, sell or transfer property in payment of debts, or mortgage or pledge it as security for debts, or create a lien upon it by means even of a judgment confessed in favor of his creditor: *Preston* v. *Spaulding*, *supra*; *Field* v. *Geohegan* (1888), 125 Ill. 70. Such transactions often take place in the ordinary course of business, when the debtor has no purpose, in the near future, of discontinuing business, or of going into bankruptcy and surrendering control of all his property. A debtor is not bound to succumb under temporary reverses in his affairs, and has the right, acting in good faith, to use his property in any mode he chooses, in order to avoid a general assignment for the benefit of his creditors. We only mean by what has been said, that when an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with an intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which such transfers are made, and that result is reached, whatever their form, will be held to operate as an assignment, the benefits of which may be claimed

by any creditor not so preferred, who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute. Such, we think, is the necessary result of the decisions in the highest court of the State.

The views we have expressed find some support in adjudged cases in the Eighth Circuit, where the courts have construed the statute of Missouri [Rev. Stat. Ch. 5, §354, page 54, ed. 1879], providing that " every assignment of lands, tenements, goods, chattels, effects, and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims." Referring to that statute, KREKEL, J., said, in *Kellog* v. *Richardson* (1883), 19 Fed. Repr. 70, 72, following the previous case of *Martin* v. *Hausman* (1882), 14 Id. 160—

" A merchant may give a mortgage or a deed of trust in part or all of his property, to secure one or more of his creditors, thus preferring them, but he cannot convey the whole of his property to one or more creditors and stop doing business. Such turning over and virtually declaring insolvency brings the instrument or act by which it is done within the assignment law of Missouri, which requires a distribution of the property of the failing debtor for the benefit of all the creditors in proportion to their respective claims. Such is the declared policy of the law; it places all creditors upon an equal footing."

So, in *Kerbs* v. *Ewing* (1884), 22 Fed. Repr. 693, where Judge MCCRARY, referring to the Missouri statute, said—

" No matter what the form of the instrument, where a debtor, being insolvent, conveys all his property to a third party, to pay one or more creditors, to the exclusion of others, such a conveyance will be construed to be an assignment for the benefit of all the creditors; the preference being in contravention of the assignment laws of this State."

Again, in *Freund* v. *Yaegerman* (1884), 26 Fed. Repr. 812, 814, it was said by TREAT, J., that the conclusion reached by Mr. Justice MILLER, and Judges MCCRARY, KREKEL, and himself, was—

" That, under the statute of the State of Missouri, concerning voluntary assignments, when property was disposed of in entirety or substantially—that is, the entire property of the debtor, he being insolvent—it fell within the provisions of the assignment law. The very purpose of the law was that no preference should be given. No matter by what name the end is sought to be effected, it is in violation of that statute. You may call it a mortgage, or you may make a confession of judgment, or use any other contrivance, by whatever name known, if the purpose is to dispose of an insolvent debtor's estate, whereby a preference is to be effected, it is in violation of the statute."

See, also, *Perry* v. *Corby* (1884), 21 Fed. Repr. 737; *Clapp* v. *Dittman* (1884), Id. 15; *Clapp* v. *Nordmeyer* (1885), 25 Id. 71.

If Alexander White, Jr., had made a formal assignment of his entire property, in trust for the benefit, primarily or exclusively, of his mother, sisters, and brother, as creditors, its illegality would have been so apparent that other creditors would have been allowed to participate in the proceeds of sale. By the conveyances, bill of sale, confession of judgment, and transfers, all made about the same time, and pursuant to an understanding previously reached, he has effected precisely the same result as would have been reached by a formal assignment to a trustee for the exclusive benefit of his mother, brother, and sisters. The latter is forbidden by the letter of the statute, and the former is equally forbidden by its spirit. Surely, the mere name of the particular instruments by which the illegal result is reached ought not to be permitted to stand in the way of giving the relief contemplated by the statute. Courts of equity are not to be misled by mere devices, nor baffled by mere forms.

It remains only to consider the effect of these views upon the decree below. We have already seen that the Circuit Court proceeded upon the ground that the conveyances, bill of sale, confession of judgment, and transfers by Alexander White, Jr., were made without adequate consideration, and with intent to hinder, delay, and defraud the appellee. Upon these grounds, it gave him a prior right in the distribution of the property. We are not able to assent to this determination of the rights of the parties, for the mother, sisters and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors. But their attempt to obtain such illegal preference ought not to have the effect of depriving them of their interest, under the statute, in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended, by the statute, to give priority of right to the creditors who are not preferred. All that the appellee can claim, is to participate in such proceeds upon terms of equality with other creditors.

It results that the decree below is erroneous, so far as it

directs the property, rights and interests therein described to be sold in satisfaction, primarily, of the sums found by the decree to be due from Alexander White, Jr., to the appellee. The case should go to a master to ascertain the amount of all the debts owing by Alexander White, Jr., at the date of said conveyances, bill of sale and transfers. In respect to the amounts due from him to his mother, sisters, and brother, respectively, it is not necessary, at this time, to express any opinion, further than that the accounting in the Probate Court between them is not conclusive against the appellee. It will be for the Court below to determine, under all evidence, what amounts are justly due from Alexander White, Jr., to his mother, sisters and brother, taking into consideration all the circumstances attending his management of the property, formerly owned by his father, whether real or personal.

To the extent we have indicated, the decree is reversed, each side paying one-half the costs in this Court; and the cause is remanded, with a direction for further proceedings not inconsistent with this opinion.

The Chief Justice did not sit in this case, or participate in its decision.

The principal case establishes, that three things are forbidden to a man who is unable to go on in business: he may not convey, nor mortgage, nor confess judgment. If he contemplate continuance in business, then he may do any or all of these things, so long as he does not thereby prevent himself from, in fact, continuing his business.

The general principles upon which the judgment of the principal case was founded, were well declared by AGNEW, J., in *Miner's Nat'l Bank App.* (1868), 57 Pa. 193, 199: "So long as men manage their own affairs, and preserve the control of their property, it has been the policy of our laws to suffer them to deal with their estates, in the absence of fraud, as they find most conducive to their interests. * * * * This results, in the absence of bankrupt laws, from that freedom of individual action which the genius of our institutions secures and concedes, as a measure of liberty belonging to the citizen, and necessary to the development of the greatest good of society."

"It supposes that while the debtor preserves control of his affairs in his own hands, the vigilance of creditors will be competent to protect their interests and to avert any injury."

"When a man can no longer go on in business, and what he has must pass into the liquidation of his debts, fairness requires that he should not dictate the course his property shall take. To permit it, is to afford an opportunity for the enemies of virtue to obtain preference, and to create prejudicial hostility."

And the contrary expressions in *Blakey's App.* (1848), 7 Pa. 449, and

Lea's App. (1848), 9 Id. 504, were held not to prevail over the true intent of the (Pa.) Voluntary Assignment Act. But, unfortunately, these cases have since been established as the law of Pennsylvania.

"The question presented is not whether an insolvent debtor may secure a creditor, but whether insolvent debtors may, by way of chattel mortgages, and assignments to certain creditors, as in the case before us, assign and transfer their entire property for the benefit of such creditors, with the intent of having one of such creditors, for himself and as agent and trustee for the others, take immediate possession, and convert the same into money, and then to divide the same *pro rata* among such favored creditors:" CASSODAY, J., *Winner* v. *Hoyt* (1886), 66 Wis. 227, 239.

The contrary view to that taken in the principal case is well expressed by TAYLOR, J., dissenting in the last mentioned case: "Under our statute, no creditor of an insolvent debtor has any preference over another, nor has he any right to demand that the debtor shall not prefer his other creditors to him, unless he voluntarily chooses to make an assignment for the benefit of all his creditors. The creditor has no power to compel a voluntary assignment, or an equal distribution of the assets of his debtor, in any case. * * * * If the writings in this case are an assignment in substance, it is so simply because the debtor has given all his assets to the preferred creditors. * * * * And why should not the same result follow, if the debtor suffers an execution upon a judgment obtained by one creditor, in the ordinary course of proceeding, of sufficient amount to sweep away all the assets to be levied?" (*Winner* v. *Hoyt* (1886), 66 Wis. 248, 251.)

Such statutes are to be liberally construed: see the principal case and the Illinois decisions there cited. And, as a consequence, all courts recognize that there is no test of form. A conflict of decisions arises, however, on the lines of the two views of a debtor's right to prefer in payment, or the means of obtaining payment, without actual fraud.

The various decisions may be classified by States, and they in one of three divisions: (1) Where all preference is forbidden; (2) where preferences in the assignment are forbidden; and (3) where preferences are allowed.

Only the first of these three classes can be considered here.

The Alabama Code of 1887 provides, § 1737, page 419 (Code of 1876, § 2126): "Every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, shall be and inure to the benefit of all the creditors of the grantor equally; but this section shall not apply to or embrace mortgages given to secure a debt contracted contemporaneously with the execution of the mortgage, and for the security of which the mortgage was given."

The last clause was added, by Act of February 23, 1883 (Laws, p. 189), to obviate the construction made in *Shirley* v. *Teal* (1880), 67 Ala. 449, and *Danner* v. *Brewer* (1881), 69 Id. 191; SOMERVILLE, J., *Warten* v. *Matthews* (1885), 80 Id. 430.

Prior to the Code of 1876, preferences were permitted, and in forbidding such distinctions between creditors, the courts of that State hold that the application of this statute does not depend upon form or name, but a substantial transfer of all the property of the debtor, subject to the payment of his debts: *Danner & Co.* v. *Brewer & Co.* (1881), 59 Ala. 191, 199; *Ordway* v. *White* (1885), 80 Id. 245; *Collier* v. *Wood*, S. Ct. July 19, 1888. In these cases, the form of instrument adopted was that of a mortgage. But several papers might have

been used as unsuccessfully: *Danner* v. *Brewer*, *supra*, 200, citing *Holt* v. *Bancroft* (1857), 30 Id. 193.

The Arizona Rev. Stat., ed. 1887, Title iii. (act approved March 10, 1887), provide—"22. That every assignment, made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided, for a distribution of all his real and personal estate other than that which is, by law, exempt from execution, among all his creditors, in proportion to their respective claims, and however made, or expressed, shall have the effect aforesaid, and shall be construed to pass all such estate, whether specified therein or not, and every assignment shall be proved or acknowledged and certified and recorded in the same manner as is provided by law in conveyances of real estate or other property."

"24. Any debtor, desiring so to do, may make an assignment for the benefit of such of his creditors only, as will consent to accept their proportional share of his estate and discharge him from their respective claims, and, in such case, the benefits of the assignment shall be limited and restricted to the creditors consenting thereto; the debtor shall thereupon be and stand discharged from all further liability to such consenting creditors, on account of their respective claims, and, when paid, they shall execute and deliver to the assignee, for the debtor, a release therefrom."

"30. All property conveyed or transferred by the assignor, previous to and in contemplation of the assignment, with the intent or design to defeat, delay or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee, by the assignment, notwithstanding such transfer; and the assignee, or in case of his neglect or refusal, any creditor or creditors, may, in his name, upon securing such assignee against cost or liability, sue for, recover, collect and cause the same to be applied for the benefit of creditors, as other property, belonging to the debtor's estate in the hands of the assignee; but if it shall appear that the purchaser of any such property bought the same of the assignor, in good faith, and for a valuable consideration, and without reason to believe that the debtor was conveying or transferring the same, with the intent or design, as aforesaid, such purchaser shall be held to have acquired, as against the assignee, and creditors aforesaid, a good and valid title to such property."

"32. If any assignor shall secrete, or conceal, from his assignee, any portion of his property belonging to his estate, other than that which is exempt from execution, or shall, previous to, and in contemplation of, the assignment, transfer any property, with the intent or design to defraud his creditors, such assignor shall be adjudged guilty of a felony."

"38. Every mortgage, deed of trust, or other form of lien attempted to be given by the owner of any stock of goods, wares or merchandise, daily exposed to sale, in parcels, in the regular course of business of such merchandise, and contemplating a continuance of possession of said goods and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void."

"39. Any attempted preference, in the assignment, of one creditor, or creditors, of such assignor, shall be deemed fraudulent and without effect."

The Illinois statutes are quoted in the opinion of the principal case, and, in framework and detail, constitute a general Insolvent Law: *Hanchett* v. *Waterbury* (1885), 115 Ill. 220, 227 (per MULKEY, J.). They do not prescribe any form of assignment, and it is immaterial whether the preferences are men-

tioned or not; it is also immaterial how many instruments are used in the attempt to prefer: *Preston* v. *Spaulding* (1887), 120 Ill. 208, 218, where the Court said that "the principles here announced find support in the following authorities: *Berry* v. *Cutts* (1856), 42 Me. 445; *Holt* v. *Bancroft* (1857), 30 Ala. 193; *Kellogg* v. *Root* (1885), U. S. Circ. Ct. W. Dist. Mich., 23 Fed. Repr. 525; * * * see, also, *Burroughs* v. *Lehndorff* (1859), 8 Iowa 96; *Van Patten* v. *Marks* (1879), 52 Id. 518; *Perry* v. *Holden* (1839), 22 Pick. (Mass.) 269; *Livermore* v. *McNair* (1881), 34 N. J. Eq. 478; *Hahn* v. *Salmon* (1884), U. S. Circ. Ct., Dist. Ore., 20 Fed. Repr. 801; *Doggett* v. *Herman* (1883), U. S. Circ. Ct., Dist. Ore., 5 McCrary 269; *U. S.* v. *Griswold* (1881), U. S. Circ. Ct., Dist. Ore., 8 Fed. Repr. 496."

The importance of the principal case and of the Illinois decisions cannot be appreciated, if attention be not given to *Field* v. *Geohegan*, cited near the close of the opinion in the principal case. It establishes that the failing debtor's preference must not be in contemplation of discontinuing business: *Schroeder* v. *Walsh* (1887), 120 Ill. 403; *Hide & Leather Nat'l Bk.* v. *Rehm*, S. Ct. Ill., November 15, 1888.

The Iowa statutes provide (Rev. Code, ed. 1888, ch. 7, p. 777)—"§ 2115. No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid, unless it be made for the benefit of all his creditors, in proportion to the amount of their respective claims."

"§ 2116. In the case of an assignment of property for the benefit of all the creditors of the assignor, the assent of the creditors shall be presumed."

Under this statute, the courts of Iowa do not go to the extent of the decision in the principal case; for, in *Van Patten & Marks* v. *Burr* (1879), 52 Iowa 518,522, the court distinguished their resolution (that a chattel mortgage and an assignment for the benefit of creditors, executed on the same day, and admitted in the pleadings to be one transaction, were void), from a prior decision, in *Lampson & Powers* v. *Arnold* (1865), 19 Iowa 479, where the insolvent, simultaneously with the execution of the assignment, paid certain debts by money, by transfer of promissory notes, and by conveyance of land. "The insolvent, as long as he retains the *jus disponendi* of his property, may appropriate it to the payment of his debts, and may prefer creditors. He may use all his property this way, or he may use a part and make a general assignment of the remainder. The payment and assignment cannot obviously be regarded as one transaction, and each will be valid. * * * But if, with the intention of disposing of all his property for the benefit of his creditors, he mortgages a part and assigns the remainder, these constitute one transaction": BECK, C. J., *Van Patten & Marks* v. *Burr* (1879), 52 Iowa 523. That is, a partial assignment is still valid: *Loomis* v. *Stewart*, S. Ct. October 6, 1888; *Moore* v. *Church* (1886), 70 Iowa 208, 211; *Garrett* v. *Burlington Plow Co.* (1886), Id. 697, 703; *Bowles* v. *Creighton* (1887), 73 Id. 199, 204, citing *Aulman* v. *Aulman* (1887), 71 Id. 124, and the second decision (upon the evidence), in *Van Patten* v. *Burr* (1880), 55 Id. 224. So, also, *Van Patten* v. *Thompson* (1887), 73 Id. 103; *Farwell* v. *Maxwell* (1888), U. S. Circ. Ct. S. Dist. Iowa, 34 Fed. Repr. 727; *Burrows* v. *Lehndorff* (1859), 8 Iowa 96.

Of course, in the absence of an intention to assign, a mortgage may be made; subject to attack for hindering creditors: *Kohn Bros.* v. *Clement* (1882), 58 Iowa 589; *Aulman* v. *Aulman, supra.* An interval of even one

hour, in the absence of contradictory proof, will not be too short to form an intention to assign: *Gage* v. *Parry* (1886), 69 Iowa 605, 610; *Farwell* v. *Maxwell, supra.*

The Kentucky General Statutes, (ed. 1887, ch. 44, art. 2, page 671), provide—"§ 1. Every sale, mortgage, or assignment, made by debtors, and every judgment suffered by any defendant, or any act or device, done or resorted to by a debtor, in contemplation of insolvency, and with the design to prefer one or more creditors, to the exclusion, in whole, or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors (except as hereinafter provided), in proportion to the amount of their respective demands, including those which are future and contingent; but nothing in this article shall vitiate or affect any mortgage, made in good faith, to secure any debt or liability, created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution."

"§ 2. All such transfers as are herein declared to inure to the benefit of creditors generally, shall be subject to the control of courts of equity, upon the petition of any person interested, filed within six months after the mortgage, or transfer, is legally lodged for record, or the delivery of the property or effects transferred."

In the construction of this statute, the intention of the debtor is the essential feature of each case. Payment by an insolvent will create a presumption of a design to prefer, but this presumption is not absolute: "it will not and ought not to prevail if the circumstances of the transaction show that no preference was intended": HOLT, J., *Grimes* v. *Grimes*, Ct. App., January 7, 1888, citing *Hampton* v. *Morris* (1859), 2 Metc. (Ky.) 336, and *Thompson* v. *Heffner's Exrs.* (1875), 11 Bush. (Ky.) 353.

"While it is true, that neither the letter nor the spirit of the statute forbids a debtor from creating a debt in good faith, though he be in failing circumstances, and secure the debt by giving a mortgage on his property, simultaneously with the creation of the debt, which would hold good as against his creditors, yet, if a debtor, knowing that he is insolvent, and, in order to give a particular creditor a preference over other creditors, gives him a mortgage to secure a debt, or liability, already created, together with a liability simultaneously created, as was done in this case, and the creditor, knowing the true state of the case, as in this case, aids the arrangement, then he is not a mortgagee in good faith, to secure a debt, or liability, simultaneously created with the execution of the mortgage: BENNETT, J., *McCann* v. *Hill* (1887), 85 Ky. 574, 581. And so, when the purchasers of a lot of timber had advanced the purchase money to enable the insolvent to make delivery, by purchasing, felling and rafting the lumber, and the buyers were *bona fide* purchasers, such delivery was not a preference: *Vincent* v. *McAlpin*, Court of Appeals, June 16 and Sept. 13, 1888, citing *Napper* v. *Yager* (1881), 79 Ky. 241; *Southworth* v. *Casey* (1880), 78 Id. 395, and distinguishing *Fuqua* v. *Ferrell* (1882), 80 Id. 69. Likewise, a small payment, in the ordinary course of business, and without intent to prefer, would not be avoided as a preference, by an assignment a few days later: *Talbott's Assignee* v. *Ewalt*, Ct. App., March 1, 1888.

Maine and Maryland do not have a statutory system of assignments for the benefit of creditors, but only an Insolvent Law: Rev. Stat. Maine, ed. 1884, Title vi., chap. 70, page 572 sqq.—Code

of Maryland, ed. 1888, Art. 47; P. L. G. Art. 48.

Louisiana provides only for a state of insolvency, and does not recognize assignments: Rev. Civil Code, Title iv, chap. 3, section 7, § 2 (ed. 1888, p. 371 sqq.), and Rev. Stat. Laws, § 1781 sqq. (ed. 1876, p. 469 sqq).

Massachusetts has an insolvent system (Pub. Stat. ed. 1882, chap. 157, pages 878, 892, sqq.), but has recently recognized a voluntary assignment, providing for distribution in substantial conformity with the insolvent law: Acts of 1887, ch. 340, p. 965. Prior to this latter statute, an assignment was repeatedly held to be valid only as against assenting creditors: *Faulkner* v. *Hyman* (1886), 142 Mass. 53. "This, for the reason that there was no adequate consideration unless with the assent of the creditors, without which no insolvent debtor should be allowed so to dispose of his property, as to place it beyond their reach": DEVENS, J., Id. 54.

The New York Revised Statutes provide, as respects moneyed corporations (ed. 1888, p. 1555, ch. xviii, Title 2A, chap. 8),—"§ 187. No such conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created, or security given by any such corporation, when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law; and every person receiving, by means of any such conveyance, assignment, transfer, lien, security or payment, any of the effects of the corporation, shall be bound to account therefore to its creditors or stockholders, or their trustees, as the case shall require; and whenever any incorporated company shall have refused the payment of any of its notes, or other evidences of debt, in specie or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and every such transfer and assignment to such officer or stockholder, shall be utterly void." Under this statute, the inquiry is confined to the two points of an actual (or contemplated) insolvency and a transfer of property: BARKER, J. *Kingsley* v. *First Nat. B'k* (1884), 31 Hun. 335.

So, also, limited partnerships are restrained by Rev. Stat., ed. 1888, page 2495, Title I, chap. iv, part II), providing—"§ 20. Every sale, assignment, or transfer of any of the property or effects of such partnership, made by such partnership when insolvent, or in contemplation of insolvency, or after, or in contemplation, of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership, or insolvent partner, over other creditors of such partnership; and every judgment confessed, lien created, or security given, by such partnership, under the like circumstances, and with the like intent, shall be void, as against the creditors of such partnership."

"§ 21. Every such sale, assignment, or transfer of any of the property or effects of a general or special partner, made by such general or special partner, when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership, with the intent of giving any creditor of his own, or of the partnership, a preference over creditors of the partnership; and every judgment confessed, lien created, or security given, by any such partner, under the like circumstances, and with the like intent, shall be void, as against the creditors of the partnership."

Under this statute, if an assignment is

made with preferences, and afterwards another assignment without, the latter will be valid against subsequent attachments: *Schwartz* v. *Sautler*, Ct. App., Dec. 7, 1886.

It is uncertain whether this last section goes so far as to prevent a special partner from administering his individual property, for the benefit of his individual creditors: ANDREWS, J., *George* v. *Grant* (1884), 97 N. Y. 268; but it does not prevent a borrowing on mortgage, for the payment of individual debts. The mortgage does not create a preference, in such a case, and would only be affected by collusion between the parties, to defeat the statute: *Id.* 270.

Otherwise, an individual debtor, or a general partnership, about to stop business on account of insolvency, "has a legal right to transfer all of his property to one or more creditors, provided he does so in good faith, for its fair value, and with an honest intent to pay his debts": RUGER, C. J., *Williams* v. *Whedon* (1888), 109 N. Y. 337, where a surviving partner was allowed to assign with preferences. So in *Beste* v. *Burger* (1888), 110 Id. 644.

The Revised Statutes of New York (ch. v., Title I. A., ed. 1888, page 2542), provide in such case, that—"In all general assignments of the estates of debtors, for the benefit of creditors, hereafter made, any preference created therein (other than for wages or salaries of employees, under chapter 328 of the laws of 1884, and chapter 283 of the laws of 1886), shall not be valid, except to the amount of one-third in value of the assigned estate left, after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the assets of the assignor or assignors be insufficient to pay, in full, the preferred claims, to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same, *pro rata*, to the amount of each said preferred claims": [Added by chap. 503, Laws 1887].

It has been thought that the doctrine of the principal case is also the law of New York, and *Sweetzer* v. *Smith*, 22 Abb. N. C. 319; *Reisser* v. *Cohn*, Id. 312; *Third Nat'l Bank* v. *Clark*, Id. 312n; *Spelman* v. *Jaffrey*, Id. 315, and *Kessell* v. *Drucker*, all decided in 1889, are cited. But *Sweetzer* v. *Smith* has been reversed by the General Term of the Supreme Court (51 Hun. 642), without any opinion, and the matter must remain in doubt, until a sufficient case reaches the Court of Appeals.

In the meantime, it may be recollected that an absolute bill of sale may be shown to amount, in law, to an assignment for the benefit of creditors: *Britton* v. *Lorenz* (1871), 45 N. Y. 51; *Brown* v. *Guthrie* (1888), 110 Id. 435, 441. This possibility required the Court, in the latter of the two cases just cited, to define "the material and essential characteristic of a general assignment" to be "the presence of a trust. The assignee buys nothing and pays nothing, but takes the title for the performance of trust duties." In this case, a debtor was allowed to mortgage a part of his property for $2400; part of which sum was a debt due to the mortgagee; another part was a sum of money then loaned to the debtor; and the balance was to be paid by the mortgagee to certain named creditors of the debtor, so that the agreement did not leave to "the debtor," the right to dictate, after the transaction, what creditors should be paid. The mortgagee "became bound to pay them absolutely, out of his own means, and whether his security proved ample or insufficient. He held no part of the property in trust for the debtor, but solely as mortgagee, entitled to its proceeds till his debt was paid, and then bound to restore any surplus

realized, to the mortgagor, or those claiming under him. Such provision never hinders creditors, for they may pay the mortgage and take the property, or fasten on the surplus:" FINCH, J., *Brown* v. *Guthrie* (1888), 110 N. Y. 442.

The last cited case is worthy of note, still further, because the opinion expressly affirms *Brackett* v. *Harvey* (1883), 91 N. Y. 214, where the mortgagor was allowed to remain in possession and sell the mortgaged goods: the proceeds were applied to the reduction of the mortgage debt, and this removed any question of shielding the debtor. The decision was expressly put upon the doctrine of *Robinson* v. *Elliott* (1874), 22 Wall. (89 U. S.) 513, 523, and in affirmance of *Ford* v. *Williams* (1862), 24 N. Y. 359; *Conkling* v. *Shelly* (1863), 28 Id. 360; *Miller* v. *Lockwood* (1865), 32 Id. 293; *Frost* v. *Warren* (1870)), 42 Id. 204; *Southard* v. *Benner* (1878), 72 Id. 424.

Hence, in *Fuller Electrical Co.* v. *Lewis* (decided March 2, 1886, mem. in 101 N. Y. 674, and reported in full in 5 North East. Repr. 437, and 2 Cent. Repr. 481), DANFORTH, J., said: "It is entirely well settled that a debtor may pay one creditor in preference to another, and, unless there is an intent, at the same time, to hinder, delay, or defraud other creditors, the one so favored may retain the fruits of that preference against their claims."

Further note should be made that an assignment is allowed when it conveys a part only of the assignor's property, for the benefit of selected creditors: *Knapp* v. *McGowan* (1884), 96 N. Y. 75, 85; though an insolvent must not thereby leave his unsecured creditors unprovided for, for no one, not even a solvent debtor, can so assign his property, with a provision for the return of the surplus to himself (which is the substance of an assignment), as to leave no provision for the payment of all his debts: *Id.* 85.

Under these statutes, the courts of New York enquire also whether the assignment is made for a fraudulent purpose; "the provision of law, [Rev. Stat. ed. 1888, Title 3, chap. vii, page 2592], that every conveyance or assignment, made with intent to hinder, delay or defraud creditors, is void, is still in full force and operation, notwithstanding the act of 1858, and the various acts relating to voluntary assignments for the benefit of creditors": EARLE, J., *Loos* v. *Wilkinson* (1888), 110 N. Y. 209. So, *Talcott* v. *Hess* (1886), 4 N. Y. St. Rep. 62; *Nat'l Park B'k* v. *Whitmore* (1887), 104 N. Y. 297.

The Ohio Revised Statutes (ed. 1884, pp. 1332–4), provide—"§ 6343. All assignments in trust, to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors, in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter."

"§ 6344. All transfers, conveyances, or assignments, made by a debtor or procured by him to be made, with intent to hinder, delay or defraud creditors, shall be declared void, at the suit of any creditor; * * * ."

"§ 3156. Every sale, assignment, or transfer of any of the property or effects of the [limited] partnership, made by it when insolvent, or in contemplation of insolvency, or after, or in contemplation of the insolvency of a partner, with the intent of giving a preference to a creditor of the partnership or insolvent partner, over other creditors of the partnership, and every judgment confessed, lien created, or security given by the

partnership, under like circumstances, and with the like intent, shall be void as against the creditors of the partnership."

The Supreme Court has very recently decided the case of *Rouse, trustee*, v. *The Merchant's National Bank*, June 18, 1889, holding that a corporation for profit, organized under the laws of this State, cannot, after it has become insolvent and ceased to prosecute the objects for which it was incorporated, create preference among its creditors, by giving mortgages to secure antecedent debts. The preference falls when followed by an assignment, unless some other consideration be given. This is in accordance with a decision of JACKSON, J. in the U. S. Circ. Ct., N. Dist. Ohio (*Iron City National Bank* v. *Folls*, 1886,), which went upon the ground that the assets of an insolvent corporation were a trust fund, for the creditors.

Whether an individual debtor or a partnership, might give preferences before executing an assignment, or without so doing, is uncertain, and a decision in some pending case is thought likely. In the meantime, it may be noted that a mortgage, to secure a *bona fide* indebtedness to his wife, may be executed by an insolvent to a trustee: *Hitesman* v. *Donnel* (1883), 40 Ohio 287. The mortgagee, being a trustee in this case, did not convert the mortgage into an assignment, solely because the wife could not, at law, be made the mortgagee, and, in equity, would require judicial aid. The case does proceed upon the ground that a mortgage may be made to any *bona fide* creditor, but does not touch the point of the amount of property mortgaged. A year later (1884), a mortgage valid against the mortgagor, but not against his creditors, was held not to be made a preferred lien, by expressly excepting it from the operation of the assignment subsequently made: *Blandy* v. *Benedict* (1884), 42 Ohio 295, 298. The intention of the assignor was disregarded. Earlier still, while deciding that an assignment did not hinder, delay or defraud creditors, although it did prevent one creditor from obtaining preference by judgment, or other adverse process, BARTLEY, J., expressed the very principle upon which the Supreme Court of the United States proceeded, in the principal case: "When a man finds himself in failing circumstances, and unable to pay all his debts, he can do no act *more just and equitable*, [sic] than to surrender and assign his property, in trust, for the benefit of all his creditors:" *Hoffman et al.* v. *Mackall et al.* (1855), 5 Ohio 124, 133.

It is to be hoped that the Supreme Court will apply this honest principle to all cases of attempted preferences, and not stop at corporations.

Texas provides, Rev. Civil Code, 1888, page 65,—"ART. 65 *i.*, All property conveyed or transferred by the assignor, previous to and in contemplation of the assignment, with the intent or design to defeat, delay or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee by the assignment, notwithstanding such transfer; and the assignee, or in case of his neglect or refusal, any creditor or creditors may in his name, upon securing such assignee against cost or liability, sue for, recover, collect and cause the same to be applied for the benefit of creditors as other property belonging to the debtor's estate in the hands of the assignee; but if it shall appear in such action, that the purchaser of any such property bought the same of the assignor in good faith, and for a valuable consideration, and without any reason to believe that the debtor was conveying or transferring the same, with the intent or design aforesaid, such purchaser shall be held to have acquired, as against the assignee and cred-

itors aforesaid, a good and valid title to such property."

Under this statute, a mortgage is held to be valid when executed by an insolvent, who intended to make a voluntary assignment thereafter, if he could not effect a compromise with his other creditors: the words "bought" and "purchaser" receive an enlarged legal sense, and the mortgagee or vendee in good faith acquire a good title to the property: *Simmons Hardware Co.* v. *Kaufman*, S. Ct. April 24, 1888. And, in case of a mortgage, the value of the property is immaterial; the mortgages only have a lien and the excess is not placed beyond the reach of creditors: *Id.* These cases confirm the earlier decisions of *Jackson* v. *Harby* (1886), 65 Texas 710. 715 (S. C. 1888, 70 Id. 410); *Baldwin* v. *Peet* (1859), 22 Id. 708, 717, 718; *Watterman* v. *Silberberg* (1886), 67 Id. 100; *Scott* v. *McDaniel* (1887), Id. 315.

Payment in property may be made by an insolvent, but the creditor must not receive more property than enough to pay himself, and must not intend to do more than collect his debt: *Oppenheimer* v. *Halffe Bro.* (1887), 68 Texas 409, 412; *Smith* v. *Whitfield* (1886), 67 Id. 124; *Edwards* v. *Dickson* (1886), 66 Id. 613. This was attempted in the principal case and the Texas case should be considered in the light of the last clause of the Texas statute.

Washington Territory has an insolvent law, which concludes (Code, ed. 1881, p. 349): "§ 2052. No assignment of any insolvent debtor, otherwise than is provided in this chapter, shall be legal, or binding upon creditors."

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